STATE OF MICHIGAN

COURT OF APPEALS

MARY MULLINS, Personal Representative of the Estate of NINA F. MULLINS, Deceased,

Plaintiff-Appellee,

v

ST. JOSEPH MERCY HOSPITAL, d/b/a ST. JOSEPH MERCY HEALTH SYSTEM, JASON WHITE, M.D., RAFAEL J. GROSSMAN, M.D., and KIMBERLY STEWART, M.D.,

Defendants-Appellants,

and

JAMES R. BENGSTON and WALTER WHITEHOUSE, M.D.,

Defendants.

FOR PUBLICATION
January 31, 2006
9:10 a.m.

No. 263210
Washtenaw Circuit Court
LC No. 03-000812-NH

Official Reported Version

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

KELLY, J. *(concurring in part and dissenting in part).*

I respectfully disagree with the majority's conclusion that *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), was wrongly decided. I would reverse the trial court's denial of defendant St. Joseph Mercy Hospital's motion for summary disposition on the basis of *Ousley*, not because I am bound by court rule to follow it, but because it was correctly decided. For the reasons stated *McLean v McElhaney*, 269 Mich App 196, ___; ___ NW2d ___ (2005), I do not believe a conflict panel should be convened. I concur in all other respects.

The panel that decided *Ousley* correctly determined that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), applied retroactively. The general rule provides for full retroactive application of judicial decisions. *Pohutski v City of Allen Park*, 465 Mich 675, 695; 641 NW2d 219 (2002). However, "[i]f a judicial decision is 'unexpected' and 'indefensible' in light of the law existing at the time of the underlying facts, retroactive application of that decision is problematic." *Lincoln v Gen Motors Corp*, 231 Mich App 262, 311; 586 NW2d 241 (1998)

(WHITBECK, P.J., concurring) (citation omitted). "[C]omplete prospective application has generally been limited to decisions that overrule clear and uncontradicted case law." *Id.* On this point, our Supreme Court has quoted the United States Supreme Court:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly fore-shadowed . . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'" [*Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189-190; 596 NW2d 142 (1999), quoting *Chevron Oil Co v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971).]

However, our Supreme Court has cautioned:

> "Before any question of the retroactive application of an appellate decision arises, *it must be clear that the decision announces a new principle of law*. A rule of law is new for purposes of resolving the question of it retroactive application . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." [*Michigan Ed Employees, supra* at 191, quoting *People v Phillips,* 416 Mich 63, 68; 330 NW2d 366 (1982) (emphasis added).]

It thus bears repeating that "[c]omplete prospective application has generally been limited to decisions which overrule *clear and uncontradicted case law*." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (emphasis added).

Waltz did not overrule clear and uncontradicted case law. Rather, as *Ousley* correctly held, *Waltz* "clarified that other case law clearly established that § 5852 was '"a *saving statute*, not a statute of limitations . . . ."'" *Ousley, supra* at 494, quoting *Waltz, supra* at 650, quoting *Miller v Mercy Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002). Therefore, *Waltz* applies retroactively.

/s/ Kirsten Frank Kelly